No. SC84579

IN THE
SUPREME COURT OF MISSOURI

IN RE SHANE BEGGS,

Petitioner,

v.

DAVE DORMIRE, Superintendent
Jefferson City Correctional Center,

Respondent.

On Writ of Habeas Corpus to the Missouri Supreme Court

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Petitioner was convicted, upon a plea of guilty, of tampering in the first degree and sentenced to a term of seven years' imprisonment. Petitioner is presently incarcerated at the Jefferson City Correctional Center located in Jefferson City, Missouri. The respondent, Dave Dormire, is the Superintendent of the Jefferson City Correctional Center. Petitioner petitioned the Circuit Court of Cole County for a writ of habeas corpus pursuant to Missouri Supreme Court Rule 91. The Circuit Court of Cole County denied petitioner's petition. Petitioner then filed a petition for writ of habeas corpus in the Missouri Court of Appeals for the Western District. The Missouri Court of Appeals denied petitioner's petition. This Court has jurisdiction over this petition for writ of habeas corpus pursuant to §532.030, RSMo. 2000 and Missouri Supreme Court Rule 91.02.

STATEMENT OF FACTS

Petitioner was charged in the Circuit Court of Polk County with tampering in the first degree (Petitioner's Supplement to petition for writ of habeas corpus - - hereinafter "Supp." - - at 161-162). On July 21, 1999, petitioner pled guilty to the offense of tampering in the first degree (Supp. at 44). Petitioner was sentenced to a term of seven years' imprisonment and placed in the Long Term Drug Treatment Program pursuant to §217.362, RSMo. 2000 (Supp. at 157).

On September 24, 2001, the Circuit Court of Polk County held a hearing pursuant to §217.362.3 (Supp. at 44). At the conclusion of the hearing, the Circuit Court found that it would be an abuse of discretion to grant petitioner probation despite his successful completion of the Long Term Drug Treatment Program (Supp. at 62). Petitioner filed "Motion For Leave To File Late Notice Of Appeal And To Appeal In Forma Pauperis" in the Missouri Court of Appeals, Southern District (Supp. at 66). The Missouri Court of Appeals denied petitioner's motion holding that "no authority has been presented to the Court that would support granting leave to appeal from the order denying probation in the subject Polk County case." (Supp. at 65).

Petitioner filed a petition for writ of habeas corpus in the Circuit Court of Cole County. After the Circuit Court denied petitioner's petition, petitioner filed a petition for writ of habeas corpus in the Missouri Court of Appeals, Western District. The Missouri Court of Appeals also denied petitioner's petition (Supp. at 30). Petitioner then filed the present petition for writ of habeas corpus with this Court.

ARGUMENT

I.

PETITIONER'S CLAIM THAT HIS GUILTY PLEA WAS NOT KNOWING, VOLUNTARY OR INTELLIGENTLY ENTERED BECAUSE THE PROSECUTOR MADE POSITIVE REPRESENTATIONS THAT PETITIONER WOULD BE RELEASED ON PROBATION IF HE SUCCESSFULLY COMPLETED THE LONG TERM DRUG TREATMENT PROGRAM PURSUANT TO §217.362, RSMo. 2000 SHOULD BE DENIED BECAUSE PETITIONER FAILS TO SHOW THAT THE PROSECUTOR MADE POSITIVE REPRESENTATIONS THAT INDUCED PETITIONER INTO PLEADING GUILTY.

Petitioner's First Point Relied On alleges that his guilty plea was not knowing, voluntary or intelligently entered because the prosecutor made positive representations that petitioner would be released on probation if petitioner successfully completed the Long Term Drug Treatment Program pursuant to §217.362, RSMo. 2000.

Petitioner states that habeas corpus is the proper mechanism for seeking relief. In State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993), this Court held that a petition for writ of habeas corpus merely allows a prisoner to inquire into the cause of his confinement. Id. at 445. Claims challenging the legitimacy of confinement are extremely limited. Id. Proceedings under Rule 91 are limited to determining the facial validity of the confinement. Id. In determining that Rule 91 is extremely limited, this Court stated that:

> This state has established a procedural system that provides a timely review of criminal convictions. It allows for direct appeal and for post-conviction review of certain constitutional protections pursuant to Rules 29.15 and 24.035. Neither these proceedings nor habeas corpus, however, was designed for duplicative and unending challenges to the finality of a judgment.

Id. at 446. A person convicted of a crime is required to raise all challenges to the conviction in both a timely manner and in accordance with procedures established. Id. "To allow otherwise would result in a chaos of review unlimited in time, scope, and expense." Id. Habeas corpus is not a substitute for a direct appeal or a post-conviction proceeding. Id. Habeas corpus may not be used to raise a claim not pursued in a direct appeal or post-conviction proceeding unless the claim raises a jurisdictional issue or presents circumstances so rare and exceptional that a manifest injustice would result. Id.

In State ex rel. Clay v. Dormire, 37 F.3d 214 (Mo. banc 2000), this Court defined circumstances so rare and exceptional that a manifest injustice would result as requiring a showing that a constitutional violation probably resulted in a conviction of an innocent person. Id. at 217. A petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of "newly discovered evidence" of actual innocence. Id. If a petitioner meets this standard, the newly discovered evidence of actual innocence allows the petitioner to pass through the gateway to have his otherwise defaulted claims considered on the merits. Id. Without any new evidence of actual innocence, a "concededly meritorious constitutional violation is not in itself sufficient to establish a manifest injustice."

Id., quoting Schlup v. Delo, 513 U.S. 298, 315-16, 115 S.Ct. 851, 860-61, 130 L.Ed.2d 808 (1995). Manifest injustice applies only to guilt or innocence and not to sentencing. Id.

While this Court held in State ex rel. Nixon v. Jaynes, 73 S.W.3d 623, 624 (Mo. banc 2002), that habeas corpus is "properly invoked to challenge an improper probation revocation," in State v. Williams, 871 S.W.2d 450, 452 (Mo. banc 1994), this Court held that "there is no right to appeal a trial judge's decision to grant or deny probation." This Court has never held that the denial of probation is reviewable under Rule 91.[1] The relevance of this is related to petitioner's claim that the trial court erred in denying him probation - - which is raised in petitioner's Second Point Relied On. If petitioner is merely alleging that the trial court abused its discretion in denying probation, this claim is not reviewable pursuant to Rule 91. State v. Williams, 871 S.W.2d at 452. If, on the other hand, petitioner is alleging that the trial court failed to comply with its statutory obligations pursuant to §217.362, then petitioner's claim would be properly before this Court pursuant to Rule 91. Likewise, petitioner's claim that his guilty plea was involuntary because he was the

[1] In State ex rel. Simmons v. White, supra, this Court held that review of a parole revocation was limited to determining whether the proper procedures were followed. Id. at 445 n. 3. Likewise, in State v. Williams, supra, this Court held that an inmate incarcerated under an order revoking probation entered after the term of probation has run, or should have run, may seek relief by writ of habeas corpus. Id. at 452 n. 2. However, neither case discusses the denial of probation.

prosecutor made a positive representation that petitioner would be released if petitioner successfully completed the Long Term Drug Treatment Program pursuant to §217.362 would be properly before this Court pursuant to Rule 91.[2]

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[2] In Brown v. State, 66 S.W.3d 721 (Mo. banc 2002), this Court held that a petitioner may be entitled to relief on a claim not raised in a post-conviction relief motion if the petitioner asserts that the procedural default was caused by something external to the defense: "that is, a cause for which the defense is not responsible – and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage." Id. at 731. Because a promise that one would be released if they successfully completed the Long Term Drug Treatment Program, if part of the plea agreement, could not be raised in a post-

conviction relief motion, a petitioner could establish cause for not raising such a claim in a post-conviction relief motion.

Petitioner's First Point Relied On alleges that his guilty plea was involuntary because the prosecutor made positive representations that petitioner would be released on probation if petitioner successfully completed the Long Term Drug Treatment Program. Petitioner's brief acknowledges that the prosecutor made positive representations that petitioner would be released on probation if petitioner successfully completed the Long Term Drug Treatment Program as part of the guilty plea because the guilty plea record is missing (Brief at 14).[3] Petitioner's brief infers that because the guilty plea record is missing he is entitled to relief (Brief at 14). However, as this state court stated in State ex rel. Nixon v. Jaynes, supra, "habeas corpus petitioner has the burden of proof to show that he is entitled to habeas corpus relief ." Id. at 624, citing McIntosh v. Haynes, 545 S.W.2d 647, 654 (Mo. banc 1977)(holding that recital as to what petitioner would testify to does not amount to

[3] Petitioner's brief states "because of the state's mistake it is impossible to know precisely what positive representations were offered to induce Begg's plea" (Brief at 14). Petitioner asserts that the audio cassette containing petitioner's guilty plea also contained a recording of another proceeding involving a different defendant (Supp. at 42). The audio cassette was sent to the Office of State Court Administrator (OSCA) for transcription of the other proceeding (Supp. at 42). Petitioner further contends that conversations between the Polk County Circuit Clerk and the Office of OSCA indicates that OSCA sent the audio cassette back to the Circuit Court of Polk County but after a reasonable and diligent search the audio cassette cannot be found (Supp. at 42).

substantial evidence on the matter.); see also Taylor v. State, 51 S.W.3d 149, 151 (Mo. App. 2001) ("The burden is on the petitioner to show that he is entitled to the writ and will be denied where the allegations are insufficient.")(citation omitted).

Despite these holdings, petitioner contends that the state, and not petitioner, has the initial burden of producing evidence showing that petitioner's plea was voluntary and not in violation of due process (Brief at 15). In support of this position, petitioner cites to State v. Shafer, 969 S.W.2d 719, 727-28 (Mo banc 1998). However, Shafer did not involve a petition for writ of habeas corpus under Rule 91. Thus, Shafer is distinguishable from petitioner's case.[4]

Furthermore, while petitioner states that there is enough evidence from the hearing held pursuant to §217.362.3 regarding the terms of the plea agreement to support his claim that his plea was involuntary, such is not the case. First, petitioner cites to a quote made by the prosecutor during the §217.362.3 hearing held in September, 2001 (Brief at 16-17).

[4] Petitioner also cites this Court to Skillicorn v. State, 22 S.W.3d 678, 688 (Mo. banc 2000) and State v. Middleton, 995 S.W.2d 443, 466 (Mo. banc 1999) for the proposition that reversal is warranted if appellant exercised due diligence to correct the record. However, neither of these cases involves a petition for writ of habeas corpus under Rule 91. Thus, they are also distinguishable from the present case.

During this hearing, the prosecutor stated that petitioner entered a plea of guilty, "that he would be placed in a program for two years and then if he successfully completed that program he would be authorized or the Court ***could*** pull him back" (Supp. at 59)(emphasis added). This does not show that there was any positive representations made to petitioner when he pled guilty that petitioner ***would*** be released on probation if he successfully completed the program. This is demonstrated by the prosecutor stating that part of the plea agreement was that the court "could pull him back out" if he successfully completed the program. The prosecutor did not say that part of the plea agreement was that the court "would" pull him back out if petitioner successfully completed the program.

Petitioner also points to the prosecutor's statement that "he [petitioner] has been off the street for two years, which is what we expected to begin with" (Supp. at 59). Simply because the prosecutor expected the petitioner to be off the streets for two years does not mean that there was a positive representation made by the prosecutor that petitioner would be placed on probation if he successfully completed the program or promised he would be out in two years. An expectation and promise are two different things. Nothing in the record provided to this Court shows that petitioner was led to believe he would "only" be off the streets for two years. Simply because petitioner alleges he was promised release if he successfully completed the program does not show that petitioner is entitled to relief. A petition for writ of habeas corpus is not self-serving. Taylor v. State, 51 S.W.3d at 151.

Petitioner's First Point Relied On also states that because his petition asserts he would receive probation after completing the Long Term Drug Treatment Program is reasonably

based on positive representation made by the prosecutor he is entitled to relief because the respondent's answer did not deny this assertion as required by Missouri Supreme Court Rule 55.09. Petitioner's argument is misplaced. Although this Court relied on Rule 55.09 in State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo. banc 2001), Rule 55.09 does not apply because Rule 91 has a specific portion dealing with answers. Rule 91.09 states that the contents of the answer shall be directed to the petition and shall contain a statement whether the person who is allegedly restrained is being restrained by respondent and, if so, the circumstances and authority for such restraint. Nothing in Rule 91.09 requires admissions or denials of every specific allegation alleged in the petition. In fact, in State ex rel. Nixon v. Jaynes, supra, this Court held that:

> A particular reason exists for following the language of civil rule 55.05: that the pleading on its face will tell the trial court whether review of the record or hearing is needed. If, as in this case, the pleader does not set forth facts that would establish the illegality of his confinement, the writ of habeas corpus can be denied without a hearing or review of the trial record. The fact-pleading requirement thus preserves the court's resources for holding hearings to those cases where the petition asserts valid grounds for habeas corpus relief.

Id. at 217. This Court has never applied Rule 55.09 to answers. As previously stated, Rule 91 merely allows a prisoner to inquire into the cause of his confinement. Id. at 214. "A petition for habeas corpus relief under Missouri law is said to be limited determining the facial validity of confinement, which is based on the record of the proceeding that resulted

in the confinement." Id. "In only the most exceptional cases do courts . . . allow the opportunity to litigate claims after conviction." Id. at 215. Habeas is to balance "the need for finality of judgments and the need to accommodate the claim of a purportedly innocent defendant wrongfully convicted." Id. at 215. In other words, a petitioner cannot win by default. This is especially true where there is a specific rule for responding to petitions for writ of habeas corpus. As this Court stated in State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 373 (Mo. banc 1982), specific rules prevail over general rules. Id. at 377. There, this Court noted that Rule 86 was a special rule dealing exclusively to condemnation proceedings and thus trumped Rule 55.32(a). Id. Thus, petitioner's claim that his self-serving assertions must be interpreted as true, despite the lack of a record, is unfounded.

Finally, petitioner's First Point Relied On alleges that the sentencing court violated Rule 24.02(e) when it stated that petitioner pled guilty to the charge of witness tampering (Brief at 18). Petitioner could have raised this claim in a post-conviction relief motion filed under Rule 24.035 because the comment was made during sentencing. Petitioner cannot establish cause for not raising this claim in a post-conviction relief motion. Petitioner may not use Rule 91 to circumvent post-conviction proceedings. See Brown v. State, supra. Moreover, as stated, this comment was made at sentencing and not at the plea hearing. Thus, petitioner's argument that the court accepted petitioner's guilty plea without correcting the mistake is completely without merit because the plea was accepted on July 15, 1999, and the statement made by the Court was made at the sentencing on July 21, 1999. In fact, although

petitioner criticizes the Court for misstating the charge, and not correcting the mistake, petitioner's own counsel responded "Yes, sir" when the Court stated "Mr. Beggs pled guilty to – to the charge of witness tampering on July 15; is that correct?" (Supp. at 45). Thus, petitioner could have raised this claim in a post-conviction relief motion, and, moreover, cannot complain that the trial court erred when counsel himself misled the court. Neither petitioner or counsel chose to correct the Court as to what petitioner pled guilty to. Therefore, petitioner's First Point Relied On should be denied.

II.

PETITIONER'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING PROBATION WHEN HE SUCCESSFULLY COMPLETED THE LONG TERM DRUG TREATMENT PROGRAM PURSUANT TO §217.362, RSMo. 2000 SHOULD BE DENIED BECAUSE THE TRIAL COURT COMPLIED WITH THE STATUTORY REQUIREMENTS OF HOLDING A HEARING UPON THE SUCCESSFUL COMPLETION OF THE LONG TERM DRUG TREATMENT PROGRAM AND FOUND THAT IT WOULD BE AN ABUSE OF DISCRETION TO PLACE PETITIONER ON PROBATION DESPITE HIS SUCCESSFUL COMPLETION OF THE LONG TERM DRUG TREATMENT PROGRAM.

Petitioner's Second Point Relied On alleges that the trial court erred in denying him probation because he successfully completed the Long Term Drug Treatment Program pursuant to §217.362, RSMo. 2000 and the Board of Probation and Parole recommended petitioner receive probation.

Petitioner was sentenced pursuant to §217.362. The relevant portion of that statute states:

> Notwithstanding any other provision of the law to the contrary, the board of probation and parole may advise the sentencing court of the eligibility of the individual for probation. The original sentencing court shall hold a hearing to make a determination as to the fitness of the offender to be placed

> on probation. The court shall follow the recommendation of the board unless the court makes a determination that such placement would be an abuse of discretion.

The statute contemplates that upon successful completion of the program, the Board may advise the sentencing court of the eligibility of the individual for probation. The statute requires the sentencing court to hold a hearing to make a determination as to the fitness of the offender to be placed on probation. The sentencing court shall follow the recommendation of the Board unless the sentencing court makes a determination that placing the offender on probation would be an abuse of discretion.

Contrary to petitioner's assertion, the Court did not find that the Board abused its discretion. Rather, the Court found that it would an abuse of ***its*** discretion to place petitioner on probation. Petitioner correctly points out that if the offender successfully completes the program before the end of the twenty-four month period, the department "may" petition the court and request that probation be granted immediately. However, nothing in the record shows that the department petitioned the court requesting that petitioner be granted immediate release. Moreover, while petitioner contends that the number of months it took him to complete the program is completely irrelevant, the number of months it takes an offender to complete the program may be considered in the overall decision finding that it would be an abuse of discretion to place the offender of probation despite their successful

completion of the program.[5]. Moreover, it is not relevant to the Court's decision whether the Circuit Courts in Jasper and Greene Counties decided to grant petitioner probation.

Respondent disagrees with petitioner's interpretation of §217.362. Petitioner claims that the statute stands for the proposition that "once treated, they 'shall' get probation if recommended by the Board" (Brief at 22). However, contrary to petitioner's assertion, the statute does not mandate automatic release upon completion of the program (Brief at 25). This is because the statute states that the court shall follow the recommendation of the board "unless the ***court*** makes a determination that such a placement would be an abuse of discretion" (Emphasis added). While acknowledging this language, petitioner calls this a "judicial loophole" (Brief at 25). Furthermore, while petitioner states that the issue before this Court is limited to answering two questions: "1) In determining the Board abused its discretion, may the court exercise its own discretion?" and "2) What factors may the court permissibly rely on in finding the Board abused its discretion?" (Brief at 25), as previously stated, the sentencing court does not decide whether the Board abused its discretion, but

[5] For instance, if an offender completed the program in one or two months, the sentencing court may believe this was an insufficient amount of time to rehabilitate an offender.

rather that it would be an abuse of discretion to release the offender on probation despite successful completion of the program. In other words, the sentencing court "shall" grant probation unless it determines to do so would be an abuse of discretion.

Contrary to petitioner's assertion, this exercise of discretion would not make the word "shall" meaningless (Brief at 26). The statute contemplates that an offender who successfully completes the program shall be given probation unless the sentencing court determines that doing so would constitute an abuse of discretion. The statute does not contemplate that the sentencing court review the Board's decision. Only that the sentencing court determines that it would be an abuse of discretion to place the offender on probation despite the Board's recommendation of probation. Even though petitioner calls this a "coin toss" because the statute does not define the term "abuse of discretion," such is not the case (Brief at 26). Moreover, as petitioner points out, the words of a statute must be given their plain and ordinary meaning. The statute does not say that the court must find that the Board abused its discretion. Instead, the statute says that the "court shall follow the recommendation of the board unless the ***court*** makes a determination that such placement would be an abuse of discretion" (Emphasis added). Given their plain and ordinary meaning, it is clear that the sentencing court makes the determination that it would be an abuse of discretion to place the offender on probation despite the successful completion of the Long Term Drug Treatment Program.

In the present case, the Court held a hearing on September 24, 2001 (Supp. at 52). The Court found that it would be an abuse of discretion - - not that the Board abused its

discretion - - to grant probation despite petitioner's successful completion of the Long Term Drug Treatment Program because petitioner had eight prior convictions and numerous failures to appear in "various counties." (Supp. at 61-62). Petitioner states that the Court must have been aware of petitioner's prior convictions therefore the Court basing its decision on petitioner's prior convictions as a reason for denying probation is simply a ruse. However, the record shows that the Court was not aware of the so-called prior convictions because the convictions were obtained after petitioner pled guilty in Polk County. For instance, the Court noted petitioner waived a pre-sentence investigation (Supp. at 59). The Court stated it assumed petitioner waived the pre-sentence investigation so the Court would not be aware of the pending charges in the other counties (Supp. at 59). Moreover, petitioner's counsel acknowledged that petitioner's guilty plea was the first of many entered into (Supp. at 59). The Court noted that petitioner pled guilty in Polk County in July of 1999 while the other guilty pleas were entered in September of 1999 (Supp. at 60).

Likewise, petitioner's argument that the Court was aware of his numerous failures to appear does not appear to be supported by the record. The Court noted that the numerous failures to appear occurred in other counties (Supp. at 61-62). Thus, there is no showing that the Court was aware of these numerous failures to appear until the hearing on September 24, 2001. Finally, petitioner again states that the statute contemplates a court finding that the Board abused its discretion. Under petitioner's theory a court could find that the Board abused its discretion if, for instance, an offender had not completed the program but the Board still recommended probation. However, the statute makes clear this cannot happen:

> If it is determined by the department that the offender has not successfully completed the program, or that the offender is not cooperatively participating in the program, the offender shall be removed from the program and the court shall be advised. Failure of an offender to complete the program shall cause the offender to serve the sentence prescribed by the court and void the right to be considered for probation on his sentence.

Section 217.362.4. The statute does not contemplate court involvement if, as petitioner asserts, the offender fails to complete the program or is uncooperative in the program. Under these terms, termination from the program is automatic and the offender is not eligible for probation. As the statute states, this "void[s] the right to be considered for probation."

Because petitioner received a hearing pursuant to §217.362.3, and the Court made a finding that placing petitioner on probation would constitute an abuse of discretion despite petitioner's successful completion of the Long Term Drug Treatment Program, petitioner's petition for writ of habeas corpus should be denied.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent prays that petitioner's petition for writ of habeas corpus be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 4,590 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of November, 2002, to:

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